

DONALD M. PAYNE
10TH DISTRICT, NEW JERSEY



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ELEMENTARY AND SECONDARY EDUCATION

AT-LARGE WHIP

The Honorable Julius Genachowski
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Notice of Ex Parte Presentation
MB Docket Nos. 07-29 and 07-198

Dear Chairman Genachowski:

I am writing in regards to the Commission's pending plan to adopt an Order on program access next week. This is a matter of importance to my constituents and I would appreciate your consideration of my concerns.

I understand from recent press reports that the Commission may conclude that a video provider can petition the FCC to compel another video provider that owns a programming service to share that programming, even if the programming is delivered terrestrially. If you do proceed with such an approach, I urge you to create a balanced process that is fair to both parties to assess complaints, with no presumptions as to when programming should be shared.

In these challenging economic times, many media companies have been working hard to avoid lay-offs, including in my District. It is important that the public sector, including the FCC, does not do anything that effectively prohibits or jeopardizes investment in innovative content, new technology, and local programming given their positive impacts on the economy.

Thank you for considering this important request.

Sincerely,

Donald M. Payne
Member of Congress

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*OCC
Ex parte
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OFFICE OF
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

June 10, 2010

The Honorable Donald M. Payne
U.S. House of Representatives
2310 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Payne:

Thank you for your letter regarding the Commission's proceeding to establish procedures to review program access complaints concerning the availability of terrestrially delivered cable-affiliated programming.

On January 20, 2010, the Commission adopted a *First Report and Order* designed to promote competition in the video distribution market and enhance consumer choice. The *Report and Order* establishes procedures for the Commission to review, on a case-by-case basis, complaints from multichannel video programming distributors (MVPDs), such as direct broadcast satellite providers and telephone companies, concerning "unfair acts" related to the availability of terrestrially delivered cable-affiliated programming.

I have noted your view that a process for resolving such complaints should not contain any presumptions about particular types of programming. The *Report and Order* explains that it is unlikely that an unfair act involving local news and local community or educational programming, due to its replicable nature, will have the purpose or effect of significantly hindering or preventing the MVPD from providing satellite cable or satellite broadcast programming. However, Congress recognized in the Cable Act of 1992 that for competition to remain vibrant, cable operators cannot unjustly deny competitors access to "must have" programming. Because regional sports networks (RSNs) typically offer non-replicable content and are considered "must have" programming by MVPDs and consumers, the *Report and Order* adopts a rebuttable presumption that an unfair act involving a terrestrially delivered cable-affiliated RSN has the purpose or effect of significantly hindering or preventing the MVPD from providing programming to consumers. A cable television system operator may overcome this presumption by demonstrating that the unfair act does not have this purpose or effect.

The *Report and Order* permits MVPDs to allege three types of "unfair acts" involving terrestrially delivered cable-affiliated programming: exclusive contracts, discrimination, and undue influence. An MVPD will have the burden of demonstrating that the unfair acts have the purpose or effect of significantly hindering or preventing the MVPD from providing satellite cable or satellite broadcast programming to consumers, and must prove further that the programmer is wholly owned by, controlled by, or under common control with a cable television system operator, satellite cable programming vendor in which a cable operator has an attributable

interest, or satellite broadcast programming vendor. Finally, to ensure that a cable television system operator or affiliated programmer has an adequate opportunity to review a complaint alleging an unfair act concerning terrestrially delivered programming, and to develop a full case-specific reply, the *Report and Order* increases the amount of time to file a response to a complaint with the Commission from 20 days to 45 days.

I appreciate this opportunity to learn your views about this important matter. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

A handwritten signature in dark ink, consisting of a large, stylized 'J' followed by a horizontal line and a small flourish at the end.

Julius Genachowski